Appeal No. UKEAT/0191/14/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

Judgment handed down 2 October 2014

Before

HER HONOUR JUDGE EADY QC

(IN CHAMBERS)

MRS J DUNCAN APPELLANT

MINISTRY OF DEFENCE RESPONDENT

Transcript of Proceedings

JUDGMENT

SUMMARY

Section 121 Equality Act 2010 – purposive construction required to achieve lawful balance between the statutory aim of enabling the Armed Forces to determine complaints internally prior to litigation and a complainant's right of access to a Court/Tribunal within a reasonable time. That could be achieved by reading **section 121(2) EqA** as operating as a jurisdictional bar only where the right (under the **Armed Forces Redress of Individual Grievances (Procedure and Time Limits) Regulations 2007**) to make a referral to the Defence Council has arisen and has not been exercised.

The Employment Judge's failure to give this provision such a purposive construction had led him to strike out the Claimant's Employment Tribunal claim. It was now common ground that the Employment Judge's ruling amounted to an error of law and the appeal should be allowed on this basis.

Costs – given the outcome of the appeal, the Employment Tribunal's costs award against the Claimant cannot stand. By consent the Respondent is ordered to pay the Claimant's costs of the appeal and those occasioned by its application to strike out the claim before the Employment Tribunal.

Introduction

1. I refer to the parties as the Claimant and the Respondent as they were before the Employment Tribunal below.

2. I am here concerned with an appeal against a Judgment of the Reading Employment Tribunal (Employment Judge Gumbiti-Zimuto sitting alone at a Preliminary Hearing on 4 November 2013), sent to the parties on 20 November 2013, which ruled that the Employment Tribunal did not have jurisdiction to consider the Claimant's complaints and that the Claimant should pay the Respondent's costs in the sum of £1,440.00.

3. Both parties are now in agreement that this ruling was wrong and that the costs award cannot stand. Pursuant to paragraph 18.3 of the Employment Appeal Tribunal's Practice Direction 2013, they have reached agreement that the appeal should be allowed by consent and that the matter should be remitted to the Employment Tribunal. Having drawn up a proposed Consent Order, the parties have asked that this matter be considered on the papers.

4. This is obviously a sensible and proportionate way to proceed and I have duly taken into account the submissions provided by the parties in writing in their correspondence with the Employment Appeal Tribunal. Having done so, I am content to make the Order in the agreed terms. Given, however, that I am being asked to overturn a ruling by an Employment Judge, I do not treat this as a mere formality and provide this Judgment to explain the reasons for my approval of the consent order.

The Background

5. The Claimant enlisted in the Royal Air Force on 18 January 1994 and holds the rank of Corporal. As such she is a serving member of Her Majesty's Armed Forces.

6. In an Employment Tribunal claim presented on 26 July 2013, the Claimant has made complaints of direct sex discrimination, harassment related to her sex and victimisation. These complaints relate to events occurring in the period between 2012 until about June 2013.

7. Pursuant to **section 121 Equality Act 2010**, an Employment Tribunal's jurisdiction to hear a claim brought by a serving member of the Armed Forces is contingent on their having submitted a valid internal ("service") complaint, which has not been withdrawn. Section 121(2) provides (in summary) that a complaint is to be treated as withdrawn if it is not referred to the Defence Council (the final stage in the complaint process).

8. The Claimant had submitted various service complaints in respect of the matters complained of in her Employment Tribunal proceedings but, at the time the Claimant's Employment Tribunal claim came to be considered, her service complaint had not been referred to the Defence Council but was being considered at the first stage of the service complaints process.

9. Specific provision is made at **section 123 Equality Act 2010** in respect of the relevant time limit for complaints to be brought in the Employment Tribunal by serving members of the Armed Forces. Such proceedings may not be brought after the end of a period of six months starting with the date of the act to which the proceedings relate or such other period as the Employment Tribunal thinks just and equitable.

10. At the end of her Form ET1, the Claimant observed "I have submitted my Service complaints and submit this Claim form within the permitted 6 months for members of the Armed Forces".

11. In the ET3 in the Employment Tribunal proceedings, the Respondent objected to the Employment Tribunal hearing the Claimant's complaints, submitting (in summary) that as none of her service complaints had been referred to the Defence Council, they were to be treated as withdrawn and, thus, the ET had no jurisdiction in this regard.

12. This was the issue that came to be determined by the Reading Employment Tribunal at a Preliminary Hearing on 4 November 2013.

13. As the Claimant's service complaint had not been referred to the Defence Council, the Employment Judge took the view that it was to be treated as having been "withdrawn", thereby preventing the Tribunal from having jurisdiction to determine her complaint. That would be so notwithstanding the fact that the Claimant had no right to apply to have her service complaint referred to the Defence Council and would not have had such a right prior to the expiry of the time limit for instituting Employment Tribunal proceedings.

The Appeal – Section 121 Equality Act 2010

14. It is against this decision that the Claimant has appealed. On consideration of the proposed Notice of Appeal on the papers, His Honour Judge Peter Clark directed that it should proceed to a Full Hearing.

15. Having taken the opportunity to consider the operation of the service complaints process further, the Respondent's position has changed. As stated in the letter to the Employment Appeal Tribunal from the Treasury Solicitor of 1 April 2014, the Respondent now accepts that:

> **"… a purposive construction of s. 121 [is] required to achieve a lawful balance between the statutory aim to enable the Armed Forces to determine complaints internally prior to litigation and a complainant's right of access to a Court/Tribunal within a reasonable time."**

16. That must be right. Given the agreement that has been reached between the parties, I am reluctant to expand greatly on the reasoning in this Judgment but it is apparent that the point raises issues of how the service complaint process is compatible with a complainant's Article 6 Convention rights to "a fair and public hearing within a reasonable time by an independent and impartial tribunal …".

17. The difficulty identified can, however, be overcome by a purposive construction of the legislation in the way proposed by the Respondent:

> **"… it is agreed that section 121(2) should be read so as to operate as a jurisdictional bar only where the right (under the Armed Forces Redress of Individual Grievances (Procedure and Time Limits) Regulations 2007) to make a referral to the Defence Council has arisen and is not exercised."**

18. Failing to adopt such a purposive construction to the legislation in this case meant that the Employment Tribunal effectively barred the Claimant's right to have her complaints determined by an independent tribunal within a reasonable time. For that reason, I agree that the Employment Tribunal's Judgment cannot stand and the appeal should be allowed on this basis.

The Appeal - Costs

19. That outcome obviously also puts into issue the order for costs that the Employment Judge made against the Claimant at the end of the Preliminary Hearing. The basis for that award was stated to be that "the Claimant's argument had no reasonable prospect of success". That plainly cannot be right as, a matter of law, the Claimant's argument was essentially correct. In those circumstances, I further allow the appeal against the costs order.

20. Given its change of position in these proceedings and subsequent consent to the appeal being allowed, the Respondent has also agreed that an order should be made that it pay the Claimant's costs of the appeal and those occasioned by the Respondent's application to strike out the claim by reason of the failure to refer the service complaints to the Defence Council, such costs to be the subject of detailed assessment if not agreed.

21. As the Claimant was obliged to bring this appeal as a result of the position adopted by the Respondent below, I agree that this Court's costs jurisdiction is engaged under rule 34A(1) and/or (2A). A similar point can be made in respect of the costs before the Employment Tribunal incurred as a result of the Respondent's application to strike out the Claimant's claim. Given that this Court may exercise any of the powers of the body from which the appeal has been brought, I am further content to make the order for costs in respect of the Employment Tribunal proceedings in the terms agreed.